

April 5, 2016

Francis X. O'Brien, Esquire
411 Walnut Street
Harrisburg, PA 17101
VIA E-MAIL

Re: Distributor Displaying Stock for Retailer

Dear Mr. O'Brien:

ISSUE: This is in response to your letter dated February 4, 2016, wherein you requested an advisory opinion regarding the legality of a proposed scheme involving "planogram-type services." You explain that, under the proposal, a retail business selling malt or brewed beverages ("beer") for consumption off the licensed premises would request that its distributor decide what the shelf set of its products should be. The distributor would serve as a consultant to the retailer, making recommendations for the product mix, the number of facings of each product, and the placement on the shelves. The distributor would be paid for its services not by the retailer but by the manufacturers whose products would be sold on the shelves. The manufacturers would pay quarterly fees based, in part, upon the volume each retail store carries.

OPINION: Section 443(f) of the Liquor Code prohibits distributors/importing distributors and retail dispensers from receiving any credit, loans, money or the equivalent thereof from any other licensee for equipping, fitting out, maintaining and conducting an establishment or business operating under the distributor's/importing distributor's or retail dispenser's license. 47 P.S. § 4-443(f). The mere placing of product on a distributor's/importing distributor's or retail dispenser's floor is not considered by this office to be a thing of value or the equivalent of money.

However, making recommendations for the product mix, the number of facings of each product, and the placement on the shelves is more than merely placing product on the floor. Such activity falls within the category of "fitting out, maintaining and conducting" the business operations and therefore would be prohibited under the provisions of section 443(f).

Moreover, section 13.51 of the Board's Regulations prohibits a licensee of one class from providing a license of another class anything of value. 40 Pa. Code § 13.51. The consultant services provided by the distributor would be a thing of value provided to the retailer; the money paid by the manufacturer would be a thing of value given to the distributor.

As you are aware, this office is not authorized to interpret the federal law regarding alcohol. However, it is believed that the first ruling for 2016 issued by the Alcohol and Tobacco Tax and Trade Bureau ("TTB") (TTB Ruling 2016-1) may be applicable – and also prohibitive – of the scenario presented in your letter.

Should you have any other questions and/or issues related to the Liquor Code or the PLCB's Regulations, please feel free to once again contact this office.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Sincerely,



RODRIGO J. DIAZ
CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 16-112